No. 17-626

In The
Supreme Court of the United States

GREG ABBOTT, GOVERNOR OF TEXAS, ET AL.,

Appellants,

v.

SHANNON PEREZ, ET AL.,

Appellees.

On Appeal From The United States District Court For The Western District Of Texas

MOTION TO DISMISS OR AFFIRM AS TO HOUSE DISTRICT 90

NINA PERALES
Counsel of Record
ERNEST I. HERRERA
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND
110 Broadway Street, #300
San Antonio, TX 78205
Tel: (210) 224-5476
nperales@maldef.org

Counsel for Appellees Texas Latino Redistricting Task Force, et al.

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether the State's admitted predominant use of race in altering the boundaries of HD90 in 2013 can survive strict scrutiny when officials neither invoked the VRA nor conducted an inquiry into the requirements of the VRA when they redrew the district.

LIST OF PARTIES FILING THIS MOTION

Texas Latino Redistricting Task Force, Armando Cortez, Socorro Ramos, Gregorio Benito Palomino, Florinda Chavez, Cynthia Valadez, Cesar Eduardo Yevenes, Sergio Coronado, Gilberto Torres, Renato De Los Santos, Joe Cardenas, Alex Jimenez, Emelda Menendez, Tomacita Olivares, Jose Olivares, Alejandro Ortiz and Rebecca Ortiz

CORPORATE DISCLOSURE STATEMENT

TEXAS LATINO REDISTRICTING TASK FORCE (unincorporated)

Pursuant to Supreme Court Rule 29.6, the Texas Latino Redistricting Task Force is an unincorporated association. The Texas Latino Redistricting Task Force has no parent corporations, and no stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES FILING THIS MOTION	ii
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
MOTION TO DISMISS OR AFFIRM WITH RESPECT TO TEXAS HOUSE DISTRICT 90	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE MOTION	11
I. If the Court concludes it has jurisdiction, it should affirm the district court's decision that HD90 is unconstitutionally racially gerrymandered	11
A. This Court should affirm the district court's holding that race predominated in redrawing HD90	13
B. Texas lacked a compelling state interest in redrawing HD90	15
C. This Court should affirm the district court's holding that HD90's boundaries were not narrowly tailored to serve a compelling interest	19

TABLE OF CONTENTS – Continued

Page

II. The Court should dismiss this appeal for lack of jurisdiction 25

CONCLUSION 26

APPENDIX

Excerpts of Trial Transcript, July 10, 2017 ..... App. 1

Excerpts of Trial Transcript, July 11, 2017 ..... App. 11

TABLE OF AUTHORITIES

Page

CASES

Alabama Legislative Black Caucus v. Alabama, 135 S. Ct. 1257 (2015) 13, 15, 18, 19

Anderson v. Bessemer City, 470 U.S. 564 (1985) 12

Bethune-Hill v. Virginia State Bd. of Elections, 137 S. Ct. 788, 197 L. Ed. 2d 85 (2017) .....*passim*

Cooper v. Harris, 137 S. Ct. 1455 (2017) .....*passim*

Miller v. Johnson, 515 U.S. 900 (1995) 13, 14

Perez v. Abbott, No. SA-11-CV-360, 2017 WL 1406379 (W.D. Tex. Apr. 20, 2017) 1

STATUTES

2013 Tex. Sess. Law Serv. 1st Called Sess. ch. 2 (S.B. 3) 2

28 U.S.C. § 1253 1

52 U.S.C. § 10301, *et seq.* .....*passim*

MOTION TO DISMISS OR AFFIRM WITH RESPECT TO TEXAS HOUSE DISTRICT 90

Appellees in the above-captioned case respectfully move that the Court dismiss the appeal for lack of jurisdiction under 28 U.S.C. § 1253 or, alternatively, that the Court affirm the district court's order with respect to Texas House District (HD) 90.

OPINIONS BELOW

The appendix to the Jurisdictional Statement contains the district court's opinion on Plan H283. The appendix to the Motion to Dismiss or Affirm of appellees Perez, et al. contains the district court's opinion issuing findings of fact on Plan H283: *Perez v. Abbott*, No. SA-11-CV-360, 2017 WL 1406379 (W.D. Tex. Apr. 20, 2017).

JURISDICTION

The Jurisdictional Statement invokes this Court's jurisdiction under 28 U.S.C. § 1253. At present, this Court lacks jurisdiction over claims regarding Plan H358. *See* infra p. 25.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The appendix to the Jurisdictional Statement omits the statute appellees challenged. It is 2013 Tex.

Sess. Law Serv. 1st Called Sess. ch. 2 (S.B. 3), available at http://tinyurl.com/TXPlan358.

STATEMENT OF THE CASE

This appeal regarding HD90 involves a single state House district that Texas redrew in 2013 and that the district court unanimously concluded was an unconstitutional racial gerrymander. J.S. 77a, 82a.[1]

Unlike the other House districts that are the subject of the State's appeal, HD90 was enacted by Texas in 2013 as part of a "handful of districts" that Texas altered after conducting elections under the court-ordered 2012 interim House redistricting plan. J.S. 2. HD90 is not part of the State's argument that it cannot be held liable for discrimination in districts that it enacted in 2011 and that were carried forward into the court-ordered 2012 interim House plan.

1. Texas Representative Lon Burnam, the longtime incumbent of HD90, authored the redrawn HD90 in 2013. Having recently, and very narrowly, defeated a Latino opponent in the Democratic primary, Rep. Burnam, who is Anglo, sought to bring into HD90 non-Latino areas that had high voter turnout rates and "had consistently and overwhelmingly supported him" in the past. J.S. 83a. At the same time, he strove to ensure that HD90 had a nominal majority of Latino

[1] The State's appeal regarding HD90 is presented in its Jurisdictional Statement Question 4 and at J.S. 33-36.

voters – 50.1% Spanish surnamed voter registration (SSVR). J.S. 73a. In meeting these goals, Rep. Burnam made unabashed use of race.

- Rep. Burnam testified that when he redrew HD90 in 2013, one of his goals was to "g[e]t rid of every white voter near the western boundary of the district[.]" Task Force M.D.A. 2a.
- Rep. Burnam testified that he split the City of Sansom Park to remove blocks from HD90 with "white majority voting age population." Task Force M.D.A. 5a.
- Rep. Burnam testified that he split voting precincts to remove specific blocks from HD90 "because they're white." Task Force M.D.A. 5a-6a.
- Rep. Burnam testified that in an earlier draft of HD90 he had included a precinct that "wasn't a good match" because "there were too many white people in that district [sic]." Task Force M.D.A. 3a.
- Rep. Burnam testified that as he directed his Chief of Staff to operate the computer redistricting system to redraw HD90, "I would point out right here between this street and that street is, you know, a hundred white voters," and order the removal of those blocks from HD90. Task Force M.D.A. 4a-5a.
- Rep. Burnam testified that population equality under the one person one vote

principle "was kind of lost in the process" because "we had to deal with taking as many white voters out as we could[.]" Task Force M.D.A. 4a.

- Rep. Burnam testified that he tracked the western boundary of HD90 and looked for white people to move from HD90 into the neighboring district HD99. Task Force M.D.A. 4a.
- Rep. Burnam testified that he also split voting precincts for the sole purpose of including Latino-majority blocks in HD90. Task Force M.D.A. 5a-9a.
- Rep. Burnam's Chief of Staff, Conor Kenny, testified that he told Rep. Burnam that splitting precinct 4125 in order to draw more Latinos into HD90 would be "ugly." Task Force M.D.A. 13a. Rep. Burnam did not express concern with the "ugly" cut and instead said that the cut was "great" because it brought more Latinos into HD90. Task Force M.D.A. 12a-13a.
- Rep. Burnam testified that Mr. Kenny did not track election results while making changes to HD90 because "[i]t was purely a demographic exercise." Task Force M.D.A. 5a.
- Mr. Kenny referred to his goal of adding blocks with greater than 50% Hispanic voting age population (HVAP) and removing blocks with less than 50% HVAP as

an "operational mandate" for the redistricting of HD90. 2017 Trial Tr. 671:9-17.

- On the floor of the Texas House of Representatives, Rep. Burnam introduced his amendment as follows: "[B]asically what it does is take the African American and Hispanic population out of Representative Geren's district and puts some of my Anglo population into his district." J.S. 75a.

2. When Texas undertook to reconfigure HD90 in 2013, the district did not contain a population outside the acceptable deviation. HD90 was a Latino-majority district and did not require revision to provide electoral opportunity to Latinos. The district court had issued no ruling on any legal challenge to HD90. Nevertheless, Texas substantially altered the boundaries of HD90, shifting thousands of individuals into and out of the district. J.S. 36; J.S. 80a (observing that the changes to HD90 shifted approximately 8.4% of the ideal district population).

3. In 2011, Texas redistricted HD90 following the Census and Rep. Burnam opposed creating HD90 as a Latino voter majority district. At the time, HD90 was underpopulated by 26,288 (-15.68%) with a fast-growing Latino population that was 47.9% of the district's citizen voting age population (CVAP). 2017 Task Force Ex. 23C; Dkt. 1364 at 13-14, ¶ 69. Rep. Burnam had represented HD90 since 1997. Although Rep. Burnam believed that 2011 was the first redistricting cycle in which HD90 could be drawn as a Latino-majority

district, he instead submitted to the legislative leadership a proposed HD90 that lowered the Hispanic citizen voting age population (HCVAP) to 43.2%. Dkt.1364 at 14, ¶¶ 69, 70. The Texas Latino Redistricting Task Force, a statewide coalition of Latino organizations and advocates, responded by proposing that HD90 be configured with 51.7% HCVAP. Dkt. 1364 at 127, ¶ 627. Over Rep. Burnam's objections, the Texas Legislature adopted HD90 with a 49.7% HCVAP and 50.1% Spanish Surnamed Voter Registration (SSVR). Dkt. 1364 at 129-130, ¶¶ 634, 637.

In its March 19, 2012, opinion and February 28, 2012 order adopting the interim House redistricting plan H309, the district court did not alter HD90 or any other district in Tarrant County. Dkt. 682, 690.

A Latino candidate challenged Rep. Burnam in the 2012 Democratic Primary for HD90. Rep. Burnam attributed the 2011 changes to the district as the reason he drew a challenger for the first time in 16 years. J.S. 72a. Rep. Burnam prevailed in that race, but only by 159 votes. J.S. 72a. Voting was racially polarized in the Democratic primary. Mr. Burnam's Latino opponent received 70.6% of the Latino vote while Mr. Burnam received the majority of Anglo and African American votes. *Ibid.* Following his nomination as the Democratic candidate, Rep. Burnam was re-elected in the 2012 General Election for HD90.

4. In the 2013 special legislative session, then-Attorney General Greg Abbott urged the Texas Legislature to adopt the 2012 interim House plan in

order to "insulate the State's redistricting plans from further legal challenge." J.S. 440a. Rep. Burnam began work on new boundaries for HD90. Rep. Burnam's goal was to add a large non-Latino precinct named Lake Como, or simply Como, to HD90. The Como precinct was "a high turnout neighborhood that . . . had consistently and overwhelmingly supported [Rep. Burnam] throughout his time as HD90's representative." J.S. 83a. The Lake Como precinct had been shed from HD90 in the 2011 redistricting and Rep. Burnam wanted it back.

Rep. Burnam directed his chief of staff, Conor Kenny, to use the State's redistricting software to redraw HD90 to include Como. Intending to offer the redrawn HD90 as an amendment on the House floor, Rep. Burnam discussed his proposal with the Chairman of the House Redistricting Committee, Drew Darby. Rep. Burnam testified that Chairman Darby was "fixated" on maintaining at least 50% SSVR in HD90. J.S. 82a.

Rep. Burnam directed Mr. Kenny to raise the SSVR of HD90 above 50%. Instead of releasing Como, which had caused the drop in Latino population of the district, Mr. Burnam instructed Mr. Kenny to split precincts and swap Census blocks to add Latino population and exclude Anglo population. According to Rep. Burnam, "we really made some ugly lines to – basically we got rid of every white voter near the western boundary of the district to keep the Hispanic vote over 50 percent, but to get Como back into the district[.]" J.S. 73a. Rep. Burnam instructed Mr. Kenny on how to

draw HD90, including pointing to areas and instructing Mr. Kenny to add areas. Task Force M.D.A. 2a-3a. Rep. Burnam directed Mr. Kenny in drawing maps of HD90 because Rep. Burnam was familiar with the relevant neighborhoods and Mr. Kenny was not. Task Force M.D.A. 4a; 2017 Trial Tr. 658:10-12.

During the House floor debate on the redistricting bill, Rep. Burnam laid out his amendment, explaining that it "take[s] the African American and Hispanic population out of Representative Geren's district and puts some of my Anglo population into his district." J.S. 80a. Chairman Darby then urged the members to approve the amendment, stating that Rep. Burnam's final version of his amendment "br[ought] the numbers back over 50%." *Id.* at 81a. The amendment passed.

5. In the next Democratic primary for HD90, held in March 2014, Rep. Burnam was again challenged by a Latino opponent, a local businessman named Ramon Romero. J.S. 75a. The campaign was "hostile." J.S. 75a. Rep. Burnam conducted Spanish language robocalls urging Latino voters not to open their doors to Romero campaign workers and a political action committee supporting Rep. Burnam sent out mailers accusing Mr. Romero of being a member of the Latin Kings street gang. J.S. 75a-76a.

Mr. Romero received close to 80% of the Latino vote in the March 2014 Democratic primary and prevailed over Rep. Burnam by a narrow margin. *Ibid.* Mr. Romero subsequently won the 2014 General Election for HD90.

6. Following the State's reconfiguration of HD90 in 2013, a group of plaintiffs – appellees here – amended their complaint to claim that HD90 in H358 was an unconstitutional racial gerrymander and intentionally diluted Latino voting strength. Dkt. 891.

Following trial, the district court held in 2017 that HD90 was not intentionally dilutive but that it was an unconstitutional racial gerrymander. J.S. 71a-84a.

Texas argued in the district court that any use of race in redrawing HD90 was limited to Conor Kenny, the staffer for Rep. Burnam, and "there is no evidence that any member of the Legislature knew about Kenny's reliance on race." Docket no. 1526 at 87. Texas asserted that "[t]here is no evidence that the 2013 Legislature accepted the amendment to HD90 for any reason other than the reason stated on the record – to return Como to the district." *Id.* at 70. To the extent Texas described a belief that the use of race in HD90 was "necessary to avoid a potential violation of the Voting Rights Act," *id.* at 87, Texas limited that belief to Mr. Kenny. *Ibid.*; *see also id.* at 89 ("There is no evidence that Representative Geren, Chairman Darby, or any other member of the Legislature knew how the proposed amendment to HD 90 was drafted.").

The district court concluded first that Texas had made predominant use of race in redistricting HD90. The district court relied on "strong direct evidence" in the form of testimony by the amendment's author, Rep. Burnam, and his Chief of Staff Conor Kenny, that "explicitly acknowledg[ed] the use of race in their method"

and testimony by "Burnam speaking candidly about there being 'too many white people' in HD90." J.S. 77a. The district court noted that Rep. Burnam's statements on the House floor "are as naked a confession as there can be to moving voters into and out of districts purely on the basis of race[.]" J.S. 81a.

The district court also relied on evidence that Redistricting Committee Chairman Darby employed a mechanical racial target for Latino voter population in HD90 to conclude that "race was the predominant factor in the design of the district as a whole in 2013." J.S. 80a (noting that Chairman Darby urged House members to vote for the redrawn HD90 because it kept "the numbers back over 50%."); *see also* J.S. 82a (Rep. Burnam testified that "Darby was simply 'fixated on the number,' meaning the 50% SSVR target.").

Subjecting the use of race in HD90 to strict scrutiny, the district court held that the State's "use of race in drawing HD90 was not narrowly tailored to achieve a compelling government interest." *Id.* at 83a. The district court concluded that "the evidence shows that no one considered the legal significance of the 50% SSVR target in terms of compliance with the VRA." J.S. 82a. The district court relied on testimony by Conor Kenny that he "did not review election data or political data outside of SSVR." J.S. 82a. The district court also noted that "Burnam did not consider any changes in election performance or how primary results might change" and Chairman Darby had declined to provide "any meaningful testimony as to the potential significance of a 50% SSVR threshold or whether he considered any

other meaningful election metrics." J.S. 82a. Based on this evidence, and its evaluation of the credibility of witness testimony, the district court held that the State's invocation of VRA compliance was "vague" and that the State's use of race lacked a "strong basis in evidence." J.S. 81a, 82a.

The district court concluded that the racial gerrymandering violation, along with other intentional discrimination in H358, "must be remedied." J.S. 85a. Instead of following the schedule set out by the district court to consider what, if any, remedy would be appropriate before the 2018 election, Texas filed a notice of appeal and requested a stay from this Court. On September 12, 2017, this Court granted a stay of the district court's order pending the timely filing and disposition of an appeal. *Abbott v. Perez*, No. 17A245.

REASONS FOR GRANTING THE MOTION

I. If the Court concludes it has jurisdiction, it should affirm the district court's decision that HD90 is unconstitutionally racially gerrymandered

The HD90 appeal is straightforward. There is no serious question that Texas made predominant use of race in redrawing HD90. The author of HD90's new boundaries testified that he and his chief of staff assigned voters into and out of HD90 because of their race. Redistricting Chairman Darby and Rep. Burnam further employed a mechanical racial target of 50%

SSVR for the district as a whole. The State's use of race overrode traditional redistricting criteria such as respect for political jurisdictions and precinct boundaries.

HD90 cannot survive strict scrutiny. The district court applied this Court's recent rulings in racial gerrymandering cases and, finding no evidence that Texas legislators, including Rep. Burnam or Chairman Darby, had "a strong basis in evidence" to conclude that the Voting Rights Act required the use of race in redistricting HD90, the district court properly held that HD90 was not narrowly tailored to achieve a compelling government interest. J.S. 81a.

The district court's findings of fact are reversible only for clear error. This Court will not reverse unless it has a "definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City*, 470 U.S. 564, 573-574 (1985). With respect to findings of fact, this Court will "not reverse just because we 'would have decided the [matter] differently.'" *Cooper v. Harris*, 137 S. Ct. 1455, 1465 (2017) (*quoting Anderson*, 470 U.S. at 573). "And in deciding [whether there is clear error], we give singular deference to a trial court's judgments about the credibility of witnesses." *Id.* at 1474. The district court's assessment of the state's purpose in redrawing HD90 similarly is a finding of fact that "warrants significant deference on appeal to this Court." *Id.* at 1464.

A. This Court should affirm the district court's holding that race predominated in redrawing HD90

Texas does not challenge the district court's holding that the State made predominant use of race when redrawing HD90. J.S. 84 ("But even if race had been the predominant motive for the 2013 Legislature's drawing of HD90 . . .).

Following the two-step analysis set out in *Miller*, the district court first examined whether "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Cooper*, 137 S. Ct. at 1463 (citing *Miller v. Johnson*, 515 U.S. 900, 916 (1995)); *see also Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1264 (2015). In its analysis, the district court properly relied on "'direct evidence' of legislative intent [and] circumstantial evidence of a district's shape and demographics[.]" *Cooper*, 137 S. Ct. at 1464 (citing *Miller*, 515 U.S. at 916.)

Rep. Burnam, the author of the redrawn HD90, frankly admitted that he used race to assign voters into and out of HD90. *See* supra at 3-5. The district court concluded that Rep. Burnam's testimony, which is uncontested by Texas, constituted "strong direct evidence that race was the predominate factor motivating the decision of which individuals to place within and without HD90." J.S. 77a. *See also Cooper*, 137 S. Ct. at 1468 (crediting "uncontested evidence in the record").

The district court also properly relied on circumstantial evidence that Texas subordinated traditional race-neutral districting principles, such as respect for political subdivisions and election precinct boundaries, to racial considerations. *See Miller* at 916. For example, Rep. Burnam testified that achieving population equality "was kind of lost in the process" because "we had to deal with taking as many white voters out as we could[.]" Task Force M.D.A. 4a. Rep. Burnam also split the City of Sansom Park in order to exclude Anglo voters from HD90. Task Force M.D.A. 5a. The district court observed overall that the changes to HD90 split ten election precincts and that the precinct splits furthered none other than a racial goal. J.S. 77a; *see also Bethune-Hill*, 137 S. Ct. at 799 ("In general, legislatures that engage in impermissible race-based redistricting will find it necessary to depart from traditional principles in order to do so."). The district court further found that "neither Burnam nor Kenny identified other traditional redistricting criteria that would have justified the[] changes" to HD90. J.S. 77a-78a.

Furthermore, the district court found that redistricters employed a racial target in HD90 and subordinated traditional redistricting criteria to this target. When Rep. Burnam added the Lake Como precinct back into HD90, the district's SSVR dropped below 50%. Rep. Burnam then traded Latino and Anglo population into and out of HD90 to raise the SSVR to 50.1% as required by Redistricting Committee Chairman Darby. *See* J.S. 82a (Rep. Burnam testified that Chairman Darby was "fixated on the number" of 50%

SSVR and Chairman Darby urged House members to vote for changes to HD90 because the latest version "br[ought] the numbers back over 50%.").

The district court relied on the uncontested direct and circumstantial evidence in this case, including "an announced racial target that subordinated other districting criteria" to hold that race predominated in the redrawing of HD90. *Cooper*, 137 S. Ct. at 1469 ("Indeed . . . the court could hardly have concluded anything but."). *See also Alabama Legislative Black Caucus*, 135 S. Ct. at 1271 (concluding that legislators' pursuit of racial targets and splitting of precincts to achieve this goal constitutes "strong, perhaps overwhelming, evidence that race did predominate as a factor[.]"). The district court's examination of both the specific boundary changes to HD90 in 2013 and the overall construction of the district was consistent with this Court's guidance in *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 800, 197 L. Ed. 2d 85 (2017) ("[T]he court should not confine its analysis to the conflicting portions of the lines. That is because the basic unit of analysis for racial gerrymandering claims in general, and for the racial predominance inquiry in particular, is the district.").

B. Texas lacked a compelling state interest in redrawing HD90

In its Jurisdictional Statement, Texas abandons its previous argument that legislators' sole purpose in redrawing HD90 was to restore Lake Como to the

district. *See* Docket no. 1526 at 70 ("There is no evidence that the 2013 Legislature accepted the amendment to HD 90 for any reason other than the reason stated on the record – to return Como to the district[.]") and *id.* at 87 ("there is no evidence that any member of the Legislature knew about Kenny's reliance on race."). The State's new argument, that legislators used race in HD90 to comply with the Voting Rights Act, finds no toehold in the record.

The district court properly subjected the State's use of race to strict scrutiny. *Bethune-Hill*, 137 S. Ct. at 800; *see also Cooper*, 137 S. Ct. at 1464 ("The burden thus shifts to the State to prove that its race-based sorting of voters serves a 'compelling interest'; and is 'narrowly tailored' to that end."). Although compliance with the Voting Rights Act, 52 U.S.C. § 10301, *et seq.* has long been assumed to be a compelling reason for the predominant use of race in redistricting, *see Cooper*, 137 S. Ct. at 1464, in this case Texas redistricters never referred to compliance with the Voting Rights Act as the reason for the 2013 changes to HD90.

Discussion of redrawing HD90 to comply with the Voting Rights Act appears nowhere in the 2013 legislative record. On the House floor, Representative Burnam, the amendment's author, stated only that the new boundaries for HD90 restored the Como precinct to HD90 and also moved Anglos out of HD90 and minority voters into HD90. J.S. 80a-81a. Although Chairman Darby was "fixated" on keeping HD90's Hispanic voter registration over 50%, and urged House

members to support the redrawn HD90 on those grounds, Chairman Darby never explained his use of this numerical target. J.S. 82a. The district court also found that "Burnam and Chairman Darby apparently believed that HD90 should have an SSVR above 50% but the evidence shows that no one considered the legal significance of the 50% SSVR target in terms of compliance with the VRA." J.S. 81a-82a. Furthermore, the record contains no emails, memoranda or other documents reflecting a concern about VRA compliance when redrawing HD90.

Commonly, a state may conclude that the Voting Rights Act requires use of race in redistricting because the elements of a vote dilution claim are present. *See, e.g., Cooper*, 137 S. Ct. at 1470 ("If a state has good reason to think that all the '*Gingles* preconditions' are met, then so too it has good reason to believe that § 2 requires drawing a majority-minority district."). Here, the State's changes to HD90 were not spurred by a desire to create a Latino opportunity district in compliance with the VRA because HD90 was a Latino opportunity district before Rep. Burnam proposed redrawing it. In 2013, HD90 in Plan H309 had a majority of Latino citizen voting age population and a majority of Latino registered voters. 2017 Task Force Ex. 26-E at 3.[2]

---

[2] Ultimately, the State's redrawing of HD90 in 2013 resulted in a decrease in SSVR in the district. J.S. 73a. It is difficult to imagine how the VRA would require predominant use of race to *lower* the electoral strength of Latinos in an existing Latino opportunity district.

Similarly, the 2013 changes to HD90 were not made to preserve Latino electoral opportunity while raising the district's total population to comply with the one person one vote mandate. *See, e.g., Alabama Legislative Black Caucus*, 135 S. Ct. at 1263 (recognizing "particular difficulties" associated with trying to maintain minority electoral opportunity in underpopulated districts) *and Cooper*, 137 S. Ct. at 1474 (finding racial gerrymander where challenged district "was approximately the right size as it was[.]").

Finally, Texas does not argue that it redrew HD90 in anticipation of a favorable ruling for plaintiffs in the lawsuit challenging Plan H283 (the State's 2011 enactment). At the time that Texas redrew HD90 in 2013, the district court had made no determination regarding HD90 and Texas maintained that HD90 suffered from no legal defect. *See, e.g.,* Docket no. 1272 at 99.[3]

The State's bare assertion that legislators sought to comply with the VRA when redrawing HD90, without any supporting evidence, cannot establish that Texas had a compelling interest.

---

[3] In 2017, the district court rejected claims brought by some plaintiffs that HD90 "packed" Latino voters in violation of the VRA. The district court did conclude that Texas moved some Latino voters from HD93 into HD90 in violation of the VRA but left the question of remedy to be decided with the remedy for racial gerrymandering in HD90. J.S. 84a.

C. This Court should affirm the district court's holding that HD90's boundaries were not narrowly tailored to serve a compelling interest

In order to demonstrate narrow tailoring, a state must do more than merely invoke the Voting Rights Act. The state "must show . . . that it had 'a strong basis in evidence' for concluding that the statute required its action." *Cooper*, 137 S. Ct. at 1464 *quoting Alabama Legislative Black Caucus*, 135 S. Ct. at 1274. In other words, Texas must have "good reasons" to make predominant use of race (*Alabama Legislative Black Caucus*, 135 S. Ct. at 1274) that result from a "meaningful legislative inquiry into" VRA compliance. *Cooper*, 137 S. Ct. at 1461 (examining the legislative history of the redistricting bill for a careful evaluation of factors under the Voting Rights Act).

The legislative inquiry must include a "careful[] evaluat[ion]" of whether a VRA violation might occur without the predominant use of race. *Ibid*. Legislators must conduct a "careful assessment of local conditions and structures[.]" *Bethune-Hill*, 137 S. Ct. at 801. Considerations identified by this Court include "turnout rates . . . disenfranchised prison population, and voting patterns in the contested [] primary and general elections." *Bethune-Hill*, 137 S. Ct. at 797. This Court has also noted that process-related evidence, such as whether legislators met to discuss how to meet the requirements of the VRA, can evidence a meaningful legislative inquiry. *Id.* at 801.

Even assuming that Texas officials sought to comply with the VRA when they redrew HD90, and there is no evidence that they did, the district court found no evidence of a "meaningful legislative inquiry" into whether the Voting Rights Act required race-based redistricting.

As an initial matter, the Texas Attorney General urged the Legislature to adopt the 2012 interim House plan in order to "insulate the State's redistricting plans from further legal challenge." J.S. 440a. Rather than suggesting that the Voting Rights Act required the use of race in redrawing the boundaries of HD90, the State's chief lawyer recommended adopting the then-existing boundaries of HD90.

The Legislature held no hearings and took no public comment on possible changes to HD90. Rep. Burnam released his preliminary draft and final version of the redrawn HD90 only days before the Legislature's adoption of H358. 2017 Trial Tr. 661:10-18. As a result, no members of the public, or members of the Legislature (other than Chairman Darby) were in a position to suggest that the Voting Rights Act required any specific changes to the district.

In redrawing HD90, "[n]either Burnam nor Kenny examined election results while making these changes." J.S. 77a. Conor Kenny "never considered election or political data outside of SSVR" when using the GIS software to redraw HD90. J.S. 73a. The district court concluded: "There is no evidence that any legislator or staffer evaluated racially polarized voting in

HD90 or the amendment's effect on Latino voting ability in HD90. Burnam did not consider any changes in election performance or how primary results might change." J.S. 82a.

In addition, Rep. Burnam testified that Chairman Darby never spoke with Rep. Burnam about the potential of the changes to HD90 to dilute Hispanic voting strength beyond the question of SSVR. Task Force M.D.A. 10a. Chairman Geren, with whom Rep. Burnam swapped population in the redraw of HD90, testified that he and Rep. Burnam never had any conversations about the VRA implications of changing HD90's boundaries. (2017 Task Force Ex. 4 at 13). Texas conceded that "Kenny testified that he did not communicate with legislators (other than Burnam) at any point during his drafting of proposed amendments to HD 90." Docket no. 1526 at 89.

Texas offers a post-hoc justification for its redistricting by pointing to a brief exchange between legislative staffers. The district court made note of testimony by Conor Kenny, a legislative staffer for Rep. Burnam, that he had an "informal" conversation with a staffer for the chairman of MALC. J.S. 73a. However, in light of all the evidence, and based on credibility evaluations, the district court did not find that the exchange between staffers provided the "strong basis in evidence" required to justify the predominant use of race. J.S. 81a.

First, Texas maintained following trial that Conor Kenny did not make predominant use of race in

drafting HD90 and, even if he did, that legislators were unaware of his use of race. Docket no. 1526 at 70-71 ("[t]here is no evidence that the 2013 Legislature accepted the amendment to HD 90 for any reason other than the reason stated on the record – to return Como to the district, as Como residents had requested."). Having argued as recently as July 2017 that Conor Kenny was an independent actor whose predominant use of race, if it occurred at all, remained hidden from legislators, Texas cannot now reverse course and argue that Kenny's conversation with another staffer provides a compelling reason for the Legislature.

Second, neither Rep. Burnam nor Chairman Darby provided evidence that a conversation between staffers motivated their use of race in HD90. On the contrary, Rep. Burnam testified that he used race to redraw HD90 following a conversation with Redistricting Committee Chairman Darby and that Chairman Darby was "fixated" on the 50% SSVR number. J.S. 82a. Although decisonmakers need not memorialize every aspect of the redistricting process in writing, *see Bethune-Hill*, 137 S. Ct. at 802, they must at least show that VRA compliance motivated the drawing of district boundaries. *See Cooper*, 137 S. Ct. at 1468-1469 (noting that legislators "repeatedly told their colleagues that District 1 had to be majority-minority, so as to comply with the VRA.").

Third, Texas points to no evidence that the conversation between legislative staffers constituted a substantive exchange about the requirements of the Voting Rights Act. In its Jurisdictional Statement,

Texas does no more than quote the district court's observation that a MALC staffer "expressed concerns" over the lowered SSVR in the redrawn HD90 (J.S. 34).

As explained at trial by Conor Kenny, he took an early draft map of HD90 to a staffer for the Chairman of the Mexican American Legislative Caucus, "and just asked him what he thought of it, what his temperature was on it." Tr. 638. The staffer, Martin Golando, noted that the SSVR of HD90 had fallen below 50% and expressed doubts that MALC would support the proposal. *Ibid.* According to Kenny, Mr. Golando did not "indicate[ ] what the value behind that concern was." *Id.* at 638-639. Furthermore, Mr. Kenny could not say whether Mr. Golando was talking about support by MALC the legislative caucus or MALC members in their individual capacity. *Id.* at 661-662. Mr. Kenny's testimony contradicts the State's claims (without cites to the record) that MALC "insisted that failure to [maintain 50% SSVR] would violate VRA §2" (J.S. 4) or that MALC raised "a specific concern . . . that failure to maintain the percentage of Spanish-surnamed registered voters in HD90 would result in vote dilution." J.S. 15.

Mr. Kenny did not testify that after this conversation he made changes to HD90 in order to comply with the Voting Rights Act. Mr. Kenny testified that his changes to HD90 were intended to remove political objections because "we wanted to go in kind of quiet and fast and get this done before . . . they slammed the door shut on amendments." Tr. 640. Mr. Kenny explained his interest in the 50% SSVR target as follows: "Well, I

knew that it practically, you know, even if maybe leadership agreed if some of the people started to raise a lot of heck about it, then we could have problems with it." *Ibid.* The "problems" Mr. Kenny wanted to avoid were ones related to the legislative process. Mr. Kenny's testimony does not reflect the careful evaluation or meaningful inquiry into VRA liability required by *Cooper*. *See Cooper*, 137 S. Ct. at 1461, 1471.

The district court, after hearing the evidence at trial, "including live witness testimony subject to credibility determinations" (*Cooper*, 137 S. Ct. at 1474) concluded "the evidence shows that no one considered the legal significance of the 50% SSVR target in terms of compliance with the VRA." J.S. 81a-82a. The State's disagreement with the district court's weighing of evidence and credibility determinations does not provide a basis for appeal. *See Cooper v. Harris*, 137 S. Ct. 1455, 1478 ("We cannot disrespect such credibility judgments . . . And more generally, we will not take it upon ourselves to weigh the trial evidence as if we were the first to hear it.").

Moreover, Texas cannot turn its fact dispute into an issue of law by claiming that the district court deprived Texas of "breathing room." J.S. 85. When a state offers no "good reasons" to believe that compliance with the VRA required making predominant use of race, the court is not required to rule that the challenged district survives strict scrutiny. *Bethune-Hill*, 137 S. Ct. at 802.

Finally, even if the district court found that Texas had a strong basis in evidence to conclude that the VRA required maintenance of 50% SSVR in HD90, the solution was not to redraw the district to assign voters into and out of the district on the basis of race. The solution was to refrain from redrawing HD90 in 2013. The State's race-based redistricting of HD90 cannot survive strict scrutiny, even if the facts showed that the VRA required use of a mechanical 50% SSVR target, because it was always possible to meet that target without making predominant use of race.

II. The Court should dismiss this appeal for lack of jurisdiction

The Texas Latino Redistricting Task Force Appellees incorporate the arguments in section I. of the Motion to Dismiss or Affirm of Appellees Shannon Perez, et al. ("The Court should dismiss this appeal for lack of jurisdiction.").

CONCLUSION

For the foregoing reasons, this Court should dismiss for lack of jurisdiction or, alternatively, affirm the order of the district court.

Respectfully submitted,

NINA PERALES
Counsel of Record
ERNEST I. HERRERA
MEXICAN AMERICAN LEGAL
DEFENSE AND EDUCATIONAL FUND
110 Broadway Street, #300
San Antonio, TX 78205
Tel: (210) 224-5476
nperales@maldef.org

Counsel for Appellees Texas Latino Redistricting Task Force, et al.